

SIDE-LINING SUBSIDIARITY: UN SECURITY COUNCIL ‘LEGISLATION’ AND ITS INFRA-LAW

I Introduction

The principle of subsidiarity has a logic of legitimacy that strives to allocate responsibility at the national level in order to bring decision-making closer to those affected by it. Legitimacy is not the only reason for allocating competence to the national level. In some cases, such as the UN Security Council’s (UNSC) schemes to prevent terrorist financing and the proliferation of chemical, biological and nuclear (CBN) weapons, responsibility is allocated for reasons of effectiveness. Treating these security threats as ‘weakest-link goods’,¹ the UNSC has aimed to decentre the administration of collective security to nation-states so as to create a completely regulated inter-national sphere in which terrorists and proliferators are starved of means and opportunity to perpetrate attacks. In pursuit of this goal, the Council has sought to create shared frameworks for action by carving out a new ‘quasi-legislative’ power. In an attempt to quell criticism of this move, the Council reassured states that they would retain national control over the implementation of their obligations, thereby satisfying the principle of subsidiarity. In effect, however, subsidiarity has been side-lined by the Council’s strategy of implementation. This employs disciplinary power, as Michel Foucault called it, to generate an ‘infra-law’ at the level of technical detail and to ‘normalize’ states according to it. Discipline shares the Council’s logic of effectiveness and subsidiarity’s preference for national responsibility, but it operates below the surface of the formal law out and of the reach of subsidiarity. It offers a notion of national responsibility shorn of national control.

The argument is made in three parts. Subsidiarity’s logic of legitimacy is briefly considered in Part II, which concentrates on the logic of effectiveness underlying the UNSC’s schemes. The disparity between the open-textured norms on the face of the UNSC’s quasi-legislative resolutions and the disciplinary work of its subsidiary bodies is the focus of Part III. The Financial Action Task Force (FATF)’s Recommendations on money laundering and terrorist financing are shown to constitute disciplinary infra-law of the legislative resolutions in Part IV, which also offers an illustration of discipline’s negative effect on national control.

II Logics of effectiveness and legitimacy

The principle of subsidiarity has a logic of legitimacy, while the Security Council’s approach to the prevention of terrorist financing and CBN proliferation has a logic of effectiveness. These logics are incompatible. The UNSC’s reasoning is totalizing: It treats the international realm as a bounded space which transnational threats cannot escape as they do the boundaries of nation-states. If this bounded space can be controlled, then – the logic continues – it may be possible to

¹ Below, at II(B)(1)

deprive terrorists and proliferators of the conditions they need to succeed, such as finance and support, man-power, open borders, lax import-export controls and corrupt or incompetent criminal justice systems. The Council has framed the problem of preventing these threats as a ‘weakest link good’ that makes *every* gap, deficiency and malpractice a potential, however remote, impediment to achieving a totally regulated space and thereby preventing international terrorism and CBN proliferation. Achieving this in practice is no easy task. The Council cannot regulate the international realm on its own, as it is dependent on UN member states to carry out its own decisions.² Given this set-up and the Council’s unrepresentative post-WWII composition, it has adopted a strategy of using UN member states as nodes in a decentralized scheme of administering the entire international (not global) space. Total regulation of aspects of this space is needed to deprive terrorists and proliferators of the means and opportunity of operating. The success of the schemes depend on the capacity of all states to control their borders, maintain an effective criminal justice system and institute adequate financial regulation. The Council’s logic of effectiveness demands the eradication of all weak-links and gaps in regulation.

A. Legitimacy, effectiveness and subsidiarity

The principle of subsidiarity strives to bring decision-making closer to those affected, but neither the principle of subsidiarity, nor its logic of legitimacy is absolute. The claim that low-level decision-making is not ipso facto more legitimate is considered below. The principle of subsidiarity, unlike the concept of sovereignty, is limited because it can be displaced by reasons of effectiveness.³ On this reading subsidiarity is a ‘rebuttable presumption in favour of the local’⁴ that can be displaced by evidence that action at a higher level is more likely to be effective. This model of subsidiarity is to be found in the Treaty on European Union which holds that ‘the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States’⁵ because decisions should be taken ‘as closely as possible to the citizen’.⁶ The notion that the preference for the local can be overridden by considerations of effectiveness can also be found in the Roman Catholic principle of subsidiarity,

‘Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice...to assign to a greater and higher association what lesser and subordinate organizations can do’.⁷

² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Articles 25 and 48(1)

³ Markus Jachtenfuchs and Nico Krisch, *Subsidiarity in Global Governance*, 79 **LAW & CONTEMP. PROBS.** ? (Vol 2, 2016), at 7

⁴ *Id.* at 6

⁵ European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, 7 February 1992, OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES C 325/5; 24 December 2002, Article 5(3)

⁶ Treaty on European Union, Article 1,

⁷ Pope Pius XI, *QUADRAGESIMO ANNO* (1931), para 46, quoted in Nicholas Barber, *The Limited Modesty of Subsidiarity* 11 EUROPEAN LAW JOURNAL 308 (vol. 3, 2005) at 310

Like EU subsidiarity, the Catholic version premises the preference for the local on the capacity of these entities to accomplish given objectives. As pointed out by the editors, the most contentious issue is often where the threshold lies for displacing the preference for the local.⁸

For certain collective action problems, the threshold is fairly low. This is usually the case where collective security is concerned; arguments based on the importance of autonomy in decision-making and national diversity lack bite against arguments that coordinated action is required to tackle a common existential threat. The UN Charter reflects this sort of thinking because of the unprecedentedly potent tools with which the Council is equipped and the board discretion it has to interpret and deploy them.⁹ Exceptionally, it was empowered to decide to ‘take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security’ as well as ‘measures not involving the use of armed force’ in order ‘to give effect to its decisions’.¹⁰ As the formulation in Article 24(1) affirms, the Council was built on a principle of effectiveness and member states conferred on the Council its ‘primary responsibility’ for international peace and security ‘in order to ensure prompt and effective action’.¹¹ Effectiveness concerns squeeze out legitimacy concerns and the principle of non-intervention ‘in matters which are essentially within the domestic jurisdiction of any state’, which was designed to protect members’ sovereign,¹² is expressly made subject to Chapter VII.

The UNSC’s inclination for effectiveness over legitimacy is all the more striking action given its notorious legitimacy deficit. The Council is neither representative nor accountable.¹³ Koskenniemi summed up the problem,

‘The dominant role of the permanent five [P5], the secrecy of the Council’s procedures, the lack of a clearly delimited competence and the absence of what might be called a legal culture within the Council hardly justify enthusiasm about its increased role in world affairs’.¹⁴

All states recognized this in 2005 when heads of state agreed that the UNSC must become ‘more broadly representative, efficient and transparent’.¹⁵ A particular issue has been the five permanent members’ privileged position in the Council. They can effectively veto attempts to

⁸ Jachtenfuchs and Krisch, *supra* note 3, at 7

⁹ Nico Krisch, *Introduction to Chapter VII: The General Framework* (1237-1271), at 1243 in Bruno Simma et al (eds) *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 3rd ed. (2012)

¹⁰ UN Charter, Articles 42 and 41

¹¹ UN Charter, Article 24(1)

¹² Georg Nolte, *Article 2(7)* (280-311) at 283 in Bruno Simma et al (eds) *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 3rd ed. (2012)

¹³ But cf Frederic L. Kirgis, *The Security Council’s First Fifty Years* 89 AJIL 506 (July, 1995), at 520-528

¹⁴ Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN; A Dialectical View* 6 EUROPEAN JOURNAL OF INTERNATIONAL LAW 325 (vol 3, 1995) at 327

¹⁵ World Summit Outcome, GA Res. 60/1, para. 79 (Sept. 16, 2005), para. 153

interfere with their own jurisdictional autonomy,¹⁶ while simultaneously exerting enormous influence over Chapter VII decisions that affect states' control over their domestic spheres.¹⁷ This institutional imbalance was the result of a bargain struck when the Charter was drafted in which the great powers of 1945 agreed to guarantee international peace and security in return for institutional privileges.¹⁸ The Charter allows the permanent members to use their collective might for the collective security of everyone in situations that threaten international peace and security.¹⁹ In situations falling short of this threshold, the Council's powers to deprive states of national control is much more limited. For example, the consent of the parties is one of the core principles of UN peacekeeping,²⁰ and although member states are obliged to settle their disputes by peaceful means,²¹ the Council can do no more than make 'recommendations' to the parties so long as the dispute does not constitute a threat to international peace and security.²² The existence of Article 39 as a limit between national control and Council intervention, albeit a very fluid and indeterminate limit,²³ reflects the underlying importance of legitimacy to the effectiveness of Council action by circumscribing the conditions in which the logic of effectiveness can completely displace the logic of legitimacy.²⁴

B. Weakest-link goods and transnational security challenges

The simple equation described above in which the determination of an Article 39 situation simultaneously decides the question of where responsibility for collective security should lie and, by extension, whether priority is given to effectiveness or legitimacy, does not always work. This is especially evident where transnational threats to collective security, like international terrorism, are concerned because they are seen as posing a challenge that cannot be resolved by coercive enforcement alone. As well as taking relatively targeted measures in respect of material threats, such as the imposition of sanctions against individuals associated with al-Qaeda,²⁵ the Council has recently extended its toolkit to include measures designed to prevent international terrorism – particularly nuclear terrorism – from materializing at all. In order to do this, the Council has used so-called 'legislative'²⁶ resolutions to lay down obligations on states to prevent

¹⁶ UN Charter, Article 27(3)

¹⁷ See e.g. Kishore Mahbubani, *The Permanent and Elected Council Members*, 253-266 in D.M. Malone (ed.), *THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* (2004)

¹⁸ *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change*, UN Doc. A/59/565 (2004), at para. 77

¹⁹ UN Charter, Article 39

²⁰ UN Department of Peacekeeping Operations, *UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES* (2008), at 31

²¹ UN Charter, Article 2(3)

²² UN Charter, Article 38

²³ Nico Krisch, *Article 39* (1272-1296), at 1274 in Bruno Simma et al (eds) *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 3rd ed. (2012)

²⁴ *A More Secure World*, *supra* note 18, at 66, para. 204

²⁵ UN Doc. S/Res/1267 (15 October 1999)

²⁶ Matthew Happold, *Security Council Resolution 1373 and the Constitution of the United Nations* 16 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 593 (2003); Paul Szasz, *The Security Council Starts Legislating* 96 *AJIL*

and suppress the financing and support of terrorism,²⁷ and to counter the proliferation of nuclear, chemical and biological weapons and their means of delivery.²⁸

This move flummoxes the association of Chapter VII with centralized, top-down action because it uses Chapter VII to institute a decentralized, bottom-up approach to collective security in which each UN member state is a link in an unbroken chain of counter-terrorism. This strategy conceives of the prevention of transnational threats to collective security as a ‘weakest-link’ global public good in which each state.²⁹ The logic of allocating responsibility to nation-states is not purely a matter of legitimacy. It is primarily driven by a scheme for administrative decentralization and has a logic of effectiveness. The coincidence of these two logics masks the way that national responsibility, while it creates the impression of doing so, does not guarantee national control and, moreover, may actively *diminish* states’ control over the implementation of their obligations. This sets up the main argument of the article made in Parts III and IV; that disciplinary ‘infra-law’, which shares the logic of effectiveness with administrative decentralization, is used to control states’ implementation efforts on a sub-legal level, effectively side-lining subsidiarity.

1. Weakest-link goods

Subsidiarity is vulnerable to being side-lined where strategies aimed at securing weakest link public goods involve administrative decentralization, as is the case in the UN collective security system. In these cases, subsidiarity’s logic of legitimacy and the logic of effectiveness that underwrites administrative decentralization overlap, potentially leading to a situation where national institutions have responsibility but lack control. At the global level, administrative decentralization of responsibility from the UN to nation-states seems to be the most practicable way of attaining weakest-link goods because the central UN institutions are under-resourced and UN member-states jealously guard their sovereignty. UN institutions tend to outsource the realization of their decisions to states and, beyond the scope of the present study, to other global actors. Scott Barrett explained that ‘some global public goods can only be supplied if every country lends a hand. Should even one country not help, the entire effort may fail’.³⁰ Illustrating the concept using the eradication of smallpox in 1979, he wrote, ‘if even one country had not eliminated smallpox, the entire effort would have failed’.³¹ The UN has adopted similar

901 (vol 4, 2002); Luis Miguel Hinojosa-Martínez, *The Legislative Role of the Security Council in its Fight Against Terrorism: Legal, Political and Practical Limits* 57 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 333 (vol 2, 2008); Eric Rosand, *The Security Council as ‘Global Legislator’: Ultra Vires or Ultra Innovative?* 28 FORDHAM ILJ 542 (2004-2005)

²⁷ UN Doc. S/Res/1373 (28 September 2001)

²⁸ UN Doc. S/Res/1540 (28 April 2004)

²⁹ Scott Barrett, *WHY COOPERATE: THE INCENTIVE TO SUPPLY GLOBAL PUBLIC GOODS* (2007), at 4

³⁰ *Id.* at 47

³¹ *Id.* at 4

reasoning to prevent terrorism. The UN Secretary General's report *Uniting Against Terrorism* emphasized that,

'Terrorists exploit weaknesses in both developing and developed States to fund, organize, equip and train their recruits, carry out their attacks, and hide from arrest. Building capacity in all States must therefore be the cornerstone of the global counter-terrorism effort'.³²

This analysis became 'a core element of the global counter-terrorism effort' in the UN's Global Counter-Terrorism Strategy.³³ From this perspective, the project of preventing terrorism is imperilled by the existence of a single state with porous borders through which CBN matériel might pass into the hands of terrorists; the existence of a state which does not or cannot regulate financial transactions to prevent funds from reaching terrorists; the existence of a single port authority which lacks the capacity to monitor and control the containers which pass through. This diagnosis brings international terrorism among the 'threats without boundaries' that received top billing in the UN Secretary General's High Level Panel on Threats, Challenges and Change (HLP)'s report *A More Secure World: Our Shared Responsibility*.³⁴

The logic of the UN's approach to terrorism is further elucidated by the way transnational threats and challenges are conceptualized: As they are not neatly bounded within a single state or region, 'a threat to one is a threat to all'.³⁵ It follows that all states must take part in the solution of such problems because 'where weakest-link goods are concerned, a universal approach will usually be necessary for effective action'.³⁶ In a ministerial-level statement the UNSC affirmed that 'the active participation and collaboration of all' member states is essential to combatting terrorism.³⁷ In short, weakest-link global public goods seem to demand universal effort solutions that presuppose a bounded space that can be totally controlled. There is no room for gaps and 'whether the supply of the weakest-link global public goods succeeds or fails depends on the country that does the least'.³⁸ It is not enough for the most well-resourced and capable states to level their best efforts at the problem, or even for the majority of states to cooperate to solve the problem; the participation of *every* state becomes crucial to the success of the project.

A second feature of this strategy of prevention is that universal participation alone is not enough; it must be the right sort of participation. If the international space is to be completely regulated

³² *Uniting Against Terrorism: Recommendations for a global counter-terrorism strategy: Report of the Secretary General*, 27 April 2006, A/60/825, at 74, at 15, para. 74

³³ UN Doc. A/Res/60/288 (8 September 2006), Plan of Action, point III

³⁴ *A More Secure World*, *supra* note 18, paras 17-23

³⁵ *Id.* at para. 17

³⁶ Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods* 108 AJIL 1 (vol 1, 2014) at 9

³⁷ UN Doc. S/Res/1377 (12 November 2001)

³⁸ Barrett, *supra* note 29, at 72

so as to prevent terrorism, then individual participants' efforts must, at a minimum, avoid being counter-productive and, preferably, aim for synergy. The UN's desire for such a coordinated response is evident from its Global Counter-Terrorism Strategy, which the General Assembly described as 'a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism'.³⁹ The UNSC's quasi-legislative resolutions 1373 (2001) and 1540 (2004), the focus of this article, express this using the same formula of 'recognizing the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response'. These resolutions are meant to promote both universal participation of UN member states,⁴⁰ and a coordinated response by positing its bare bones requirements, and in so doing, amount to a decentralization of administration.

The administrative decentralization that the Council pursues with its approach to prevention has a logic of effectiveness which seems *prima facie* incompatible with subsidiarity to the extent that national authorities are unequal to carrying out their responsibilities. Conceptualization of the problem in terms of weakest-links means that incapacitous and incompetent states cannot be left out of the universal effort solution, and must be transformed if the international space is to be completely regulated. As we shall see, however, the UNSC has effectuated this transformation whilst simultaneously invoking the principle of subsidiarity.

2. Transforming incapacitous states

While the UNSC's prevention strategy centres on its quasi-legislative resolutions, positive international legal norms alone cannot address the problem of states that are unable or unwilling to carry out their obligations. If a state were to be avowedly unwilling to shoulder its responsibilities and transform its domestic sphere, it is possible that Chapter VII measures could be taken to enforce its decision.⁴¹ The Council has acknowledged that such a solution would be unsuitable for the more numerous group of states that are merely unable to implement the resolutions. It recognized 'that some States may require assistance in implementing the provisions' because they lack 'the legal and regulatory infrastructure, implementation experience and/or resources for fulfilling the' provisions.⁴² The emphasis on assistance rather than enforcement seems to have been a response to the wider membership's fears that the UNSC was attempting to act as a world government in passing quasi-legislation.⁴³ Council members seemed to accept that an iron-fisted approach to implementation was incompatible with their goal of

³⁹ UN Doc. A/Res/60/288 (8 September 2006) echoing the language of the World Summit Outcome document, at para. 82

⁴⁰ UN Charter, Articles 25 and 48(1)

⁴¹ Isobel Roele, *The Strategic Landscape on the Underside of Law* in Tanja Aalberts and Thomas Gammeltoft-Hansen (eds) *TITLE TBC*, forthcoming

⁴² UN Doc. S/Res/1540 (2004), op. 7. A similar statement on terrorist financing was made in resolution 1377 (2001).

⁴³ *Below*, at ['Open-textured' III(a)]

securing states' active involvement and avoiding grudging participation and resistance.⁴⁴ This attitude accords with an insight of Foucault, who thought that 'if you are too violent, you risk provoking revolts'.⁴⁵ Foucault studied the forms of power that replaced this sort of repressive enforcement of the sovereign will. He gave the label 'disciplinary power' to the first distinct genre of these power relations that he identified.⁴⁶

The Council's approach to implementing its quasi-legislative resolutions bears a striking resemblance to the apparatuses Foucault examined in *Discipline and Punish*. Disciplinary power has various hallmarks that are identifiable in UNSC strategies to promote implementation. In particular, the disciplinary logic of treating individuals as components within a machine resonates with the Council's desire for a universal effort solution to prevent terrorism. Individuals become effective components of disciplinary institutions through a process of 'normalization'⁴⁷ based on 'an optimal model that is constructed in terms of a certain result'.⁴⁸ The instrumental value of building this optimal capacity in individuals is manifested in the increased efficacy of the common efforts in which they are engaged. In Foucault's words discipline operates by 'composing forces in order to obtain an efficient machine'.⁴⁹ In this way, it shares the logic of effectiveness of administrative decentralization and 'allows both the characterization of the individual as individual and the ordering of a given multiplicity. It is the first condition for the control and use of an ensemble of distinct elements'.⁵⁰

As discipline brings distinct elements into a coherent whole, it becomes totalizing: 'The first action of discipline is in fact to circumscribe a space in which its power and the mechanisms of its power will function fully and without limit'.⁵¹ In the Council's approach to implementation, this is manifest in its focus on eradicating gaps and remedying deficiencies and in the logical requirement of creating entirely regulated space in order to prevent terrorism. Furthermore, discipline achieves such momentous transformations by carefully avoiding controversy. It employs 'minute technical inventions'⁵² that Foucault described as 'the other, dark side' of the formal legal framework. They work by 'extend[ing] the general forms defined by law to the infinitesimal level' and 'enabl[ing] individuals to become integrated into [the] general demands' of the law.⁵³ As we shall see, this supplies a useful description of the mechanisms developed to assist states in the implementation of the quasi-legislative resolutions. Disciplinary power relations can help to bring about the decentralized administration, but it will become clear that it

⁴⁴ Roele, *The Strategic Landscape*, *supra* note 41, at ?

⁴⁵ Michel Foucault, *The Eye of Power* in C. Gordon (ed.) *POWER/KNOWLEDGE* (1980), at 155

⁴⁶ Michel Foucault, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (trans. Alan Sheridan) (1995)

⁴⁷ Michel Foucault, *SECURITY, TERRITORY AND POPULATION: LECTURES AT THE COLLEGE DE FRANCE 1977-1978* (trans. Graham Burchell) (2009) at 56

⁴⁸ *Id.* at 57

⁴⁹ Foucault, *supra* note 46, at 164

⁵⁰ *Id.* at 149

⁵¹ Foucault, *supra* note 47, at 44-45

⁵² Foucault, *supra* note 46, at 220

⁵³ *Id.* at 222

is not at all compatible with the principle of subsidiarity. In order to achieve its objective of normalizing individual states, discipline side-lines subsidiarity.

III Quasi-Legislation and Infra-Law

As we have seen, the UNSC treats terrorism prevention as a weakest-link good that requires a universal effort solution that cannot tolerate incapacity or incompetence. Discipline provides a useful way of remedying weak links without appearing to coerce. Its function is to root out inadequacy and to normalize individuals so they become useful components of a given apparatus. In effect, the subsidiary bodies that the UNSC created to oversee implementation of the quasi-legislation, the Counter-Terrorism Committee (CTC) and the 1540 Committee, have developed an approach to assisting states that amounts to disciplinary normalization.⁵⁴ A former chairman of the CTC explained that;

‘Our aim is to raise the average level of Government performance against terrorism around the globe. This means upgrading the capacity of each nation’s legislation and executive machinery to fight terrorism. Every government holds a responsibility for ensuring that there is no weak part of the chain’.⁵⁵

This statement places the responsibility for implementation firmly on the shoulders of on nation-states, a move that echoes disciplinary power’s scrupulous parsimony.⁵⁶ The logic of effectiveness implied by the motive of administrative decentralization provides that responsibility tends to intensify rather than relax discipline’s ability to control individuals’ actions. Conversely, the logic of legitimacy underlying the principle of subsidiarity suggests that national responsibility connotes national control. The nature of discipline as ‘infra law’ enables this doublethink by side-lining subsidiarity, which remains applicable at the level of formal law in order to still states’ fears that the Council was trying to impinge on their jurisdictional autonomy.

A. Open-textured quasi-legislation

The principle of subsidiarity has been implicated in the justification and criticism of UNSC quasi-legislation. This is easiest to see in the context of resolution 1540 (2004) which imposed obligations on all states to prevent CBN materiel and its means of delivery from falling into the hands of terrorists. This resolution did not benefit from the wave of sympathy following 9/11 on

⁵⁴ Isobel Roele, *Disciplinary Power in the UN Counter-Terrorism Committee* 19 JOURNAL OF CONFLICT AND SECURITY LAW 49 (vol 1, 2014)

⁵⁵ UN Doc. S/PV.4453 (2002), at 4

⁵⁶ Foucault, *supra* note 46, at 218

which resolution 1373 on terrorist financing was passed.⁵⁷ Many states vociferously opposed the Council's quasi-legislative practice as an unwonted infraction of their jurisdictional autonomy and a disruption of the balance of competences between the Council and the General Assembly.⁵⁸ There were also fears that the obligations could be coercively imposed on states that were unduly creative or tardy in implementing them.⁵⁹ Much of the opposition was phrased in terms of states' national control and the primacy of domestic responsibility for many of the issues under discussion.⁶⁰ These objections make the same species of legitimacy claim made by the principle of subsidiarity because they assume domestic decision-making is more legitimate than centralized Council decision-making. Proponents of the resolution were compelled to acknowledge the force of these concerns, but not because they shared the logic of legitimacy that underlay them. Instead, they were moved by a logic of effectiveness that requires the cooperation of all UN members with the quasi-legislation and must therefore address their concerns *in order to* 'increase its acceptance and thereby contribute to its full and global implementation'.⁶¹ The logics of effectiveness and legitimacy support the same result of national responsibility for implementation. The problem is that far from ensuring national control, the principle of subsidiarity helps to diminish it by providing façade legitimization.

Statements given in support of the resolution by its sponsors include justifications from both effectiveness and legitimacy. As to the former, for instance, the Russian representative explained that a UNSC resolution was necessary 'to ensure the coordination of action' and to establish 'an operational framework for international cooperation'.⁶² The US representative was in agreement, adding that 'it is essential that all States — not just States parties to a specific treaty or supplier regime — maintain adequate controls over their nuclear material, equipment and expertise'.⁶³ Others justified the Council's involvement by down-playing its enforcement capability and stressing its unique ability to propound universally binding norms.⁶⁴ As to legitimacy, the sponsors reassured the UN membership that although standards were to be set at the international level, it would be for each state to decide on how implementation would take effect. For instance, the Spanish representative stressed that 'the draft resolution is not intrusive — because it gives States leeway on how to internally interpret its implementation'.⁶⁵ Similarly, the French

⁵⁷ Ian Johnstone, *The Security Council as Legislature* 80, in B. Cronin and I. Hurd (eds) *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY* (2008), at 90

⁵⁸ Non-Aligned Movement, UN Doc. S/PV.5635 (2007), at 29; India, UN Doc. S/PV.4950 (22 April 2004), at 23; Namibia, UN Doc. S/PV.4950 (Resumption 1) (22 April 2004), at 17

⁵⁹ For the NAM statement, see; UN Doc. S/PV.4950 (Resumption 1) (22 April 2004), at 4

⁶⁰ See e.g. India (UN Doc. S/PV.6518 (20 April 2011), at 3-4); Norway (UN Doc. S/PV.5635 (Resumption 1) (23 February 2007), at 2); Brazil (UN Doc. S/PV.5635 (Resumption 1) (23 February 2007), at 14); South Africa (UN Doc. S/PV.7169 (7 May 2014), at 27)

⁶¹ UN Doc. S/PV.4950 (22 April 2004), at 18

⁶² UN Doc. S/PV.4956 (28 April 2004), at 6 (RF)

⁶³ UN Doc. S/PV.4956 (28 April 2004), at 5

⁶⁴ UK, UN Doc. S/PV.4956 (28 April 2004), at 7; Spain, UN Doc. S/PV.4950 (22 April 2004), at 7; France, UN Doc. S/PV.4950 (22 April 2004), at 8-9

⁶⁵ UN Doc. S/PV.4950 (22 April 2004), at 7

representative promised that ‘the Council is establishing the goals, but it leaves each State free to define the penalties, legal regulations and practical measures to be adopted’.⁶⁶ These are fairly clear promises of national control.

The promises seemed to be borne out by the open-textured language of resolution 1540. States’ obligations are contained in the first three operative paragraphs: the first decides they shall refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use’ CBN weapons and their means of delivery; the second decides they shall ‘adopt and enforce effective laws which prohibit’ non-state actors from doing these things; and the third paragraph decides that ‘all States shall take and enforce effective measures to establish domestic controls to prevent’ CBN proliferation. Operative paragraph three gives a little more detail about what sorts of controls are intended in four subparagraphs which require states to develop measures to account for and secure relevant materials, to develop physical protection measures, to develop border security and law enforcement capacity to counter the trafficking of relevant materials and to develop national export and trans-shipment controls. None of these prescriptions is fleshed out in the text of resolution 1540 which only specifies that the measures taken be ‘effective’. This factor was material to many states’ support for the resolution. For instance, Pakistan stated that its concerns that the Council was attempting to ‘assume the stewardship of global non-proliferation and disarmament issues’ were allayed because 1540 ‘does not seek to prescribe specific legislation, which is left to national action by States’.⁶⁷

Resolution 1373 is also open-textured. The three pertinent paragraphs of 1373 are only slightly more detailed than those of 1540. The first obliges states to prevent and suppress the financing of terrorist acts; to criminalize the provision or collection of funds for terrorist activities; to freeze the funds of those who commit or participate in terrorist activities; and to prohibit those over whom they have jurisdiction from making funds or other services available to terrorists directly or indirectly. The second paragraph lists seven obligations for states to refrain from providing active or passive support to terrorists; to prevent the commission of terrorist acts; to deny safe haven to supporters of terrorism; to prevent terrorists using their territories to launch attacks against other states; to ensure that those involved in terrorist activities are brought to justice; to cooperate with other states in criminal investigations and proceedings against terrorists; and to take effective border control measures to prevent the movement of terrorists. The third paragraph is not binding, but exhorts states to take measures to grease the wheels of cooperation and to respect various international law norms including those relating to human rights and refugee law.

On their face, the provisions of the quasi-legislative resolutions leave states broad interpretive discretion even though positive action is required to implement them. This impression has led

⁶⁶ UN Doc. S/PV.4950 (22 April 2004), at 8

⁶⁷ UN Doc. S/PV.4956 (28 April 2004), at 3

Tsagourias to suggest that the resolutions are commensurate with the principle of subsidiarity because they respect states' jurisdictional autonomy and strike a proportionate balance between central standard-setting and local implementation:

'states retain a meaningful degree of jurisdictional authority because they enjoy flexibility in the way they implement the SC legislation and participate thus in the law-making process together with the Security Council, without, however, deviating from the common goal'.⁶⁸

The principle of subsidiarity, then, has increased the legitimacy of the UNSC's controversial quasi-legislative practices in the minds of academics as well as states. Formally speaking, states have control over the way they implement their obligations because of the open-textured nature of the legal provisions.

B. Infra-law

A different picture emerges if we look beneath the surface of the resolutions at the techniques and mechanisms that have been developed to assist states with their implementation efforts. These supportive initiatives do not belong to the world of formal law, but to what Foucault called 'infra law'.⁶⁹ Typically, they rely on expert technical knowledge to rescale the broad obligations addressed to UN member states for the operational level of border guards, police units and financial regulators. These technical efforts to enhance and support states' implementation efforts are disciplinary in nature. They suggest what Foucault called a 'code of normalization' rather than a code of law; a jurisprudence of 'clinical knowledge'.⁷⁰ They condition 'the underside of law', complementing the hard formal law of the resolutions by seeming 'to constitute the same type of law on a different scale, thereby making it more meticulous'.⁷¹ This helps to square the UNSC's allocation of competence to the national level in the light of the suggestion that 'the supply of subsidiarity will be higher in regimes dealing with issues without international repercussions'.⁷² Just as one might expect with weakest-link goods as important as the prevention of CBN proliferation and international terrorism, the jurisdictional autonomy of states is more limited than it first appears.

Effectively realizing the Council's scheme of administrative decentralization has required many states to take positive measures to comply with the quasi-legislative resolutions, and a large proportion of them have needed technical and financial assistance in order to do so. The UNSC

⁶⁸ Nicholas Tsagourias, *Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity* 24(3) LEIDEN JOURNAL OF INTERNATIONAL LAW 539 (vol 3, 2011), at 555

⁶⁹ *Supra*, section II(B)(2)

⁷⁰ Michel Foucault, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE 1975-76*, (David Macey trans.) (2003), at 38

⁷¹ Foucault, *supra* note 46, at 222

⁷² Jachtenfuchs and Krisch, *supra* note 3, at 17

accepted this early on after the passage of resolution 1373,⁷³ and resolution 1540 expressly recognized that many states would require implementation assistance.⁷⁴ The Council's strategy for achieving implementation eschews the coercive enforcement of legal norms and replaces it with technical norms and learning processes coordinated by its subsidiary bodies, the CTC and 1540 Committee. Initially, these bodies were charged with monitoring states' implementation to identify any weak links and gaps in implementation. Later they were given a broader mandate to assist states' implementation efforts. Resolution 1977 encouraged 'all States to prepare on a voluntary basis national implementation action plans, with the assistance of the 1540 Committee as appropriate, mapping out their priorities and plans for implementing the key provisions of resolution 1540'.⁷⁵ Similarly, the CTC has been asked by the UNSC to help states and regional organization draft counter-terrorism strategies to further the implementation of 1373.⁷⁶ The two functions of monitoring and assistance are complementary; the identification of weak links leads to assistance and not punishment. The sub-committees share an 'essentially *corrective*'⁷⁷ approach characteristic of disciplinary power, that uses surveillance to seek out and reverses in states' implementation efforts and correction to remedy them so that are 'normalized' into being effective components of the Council's universal effort solution.

The sub-committees take on very little of this work themselves.⁷⁸ They outsource the provision of technical assistance to myriad expert and technical agencies within and outside the UN family, including the FATF to which we shall return. The 1540 Committee was asked to 'liaise on the availability of programmes which might facilitate the implementation of resolution',⁷⁹ instead of passively requesting information from other organizations and states.⁸⁰ The CTC's instruction was to 'facilitate technical assistance, specifically by promoting engagement between providers of capacity-building assistance and recipient'.⁸¹ In carrying out their mandates, the committees act as conduits between the formal legal norms contained in the UNSC resolutions and technical infra-law produced in the form of best practices, training manuals, legislative models and other forms of expert guidance.

Just as discipline operates on the basis of an optimal model,⁸² so the committees compose implementation ideals by singling out certain norms and institutions as technically authoritative. This work has been undertaken pursuant to UNSC mandates to 'explore with States and

⁷³ UN Doc. S/Res/1377 (12 November 2001)

⁷⁴ UN Doc. S/Res/1540, op. 7

⁷⁵ UN Doc. S/Res/1977 (20 April 2011), op 8

⁷⁶ UN Doc. S/Res/2129 (17 December 2013), op. 7

⁷⁷ Foucault, *supra* note 46, at 179

⁷⁸ For a study of disciplinary power in the work of the CTC, see Isobel Roele, *Disciplinary Power in the UN Counter-Terrorism Committee* 19 JOURNAL OF CONFLICT AND SECURITY LAW 49 (vol 1, 2014)

⁷⁹ UN Doc. S/Res/1977 (20 April 2011), op 10

⁸⁰ UN Doc. S/Res/1810 (25 April 2008)

⁸¹ UN Doc. S/Res/2129 (17 December 2013), op. 7

⁸² *Supra*, at III(B)

international, regional and sub-regional organizations experience-sharing and lessons learned⁸³ and in 2008 the Council *decided* that the Committee should undertake such work.⁸⁴ In 2011, this was taken further when the 1540 Committee was provided with a Group of Experts and charged with the task of ‘identify[ing] effective practices, templates and guidance, with a view to develop[ing] a compilation, as well as to consider preparing a technical reference guide about resolution 1540 (2004), to be used by States on a voluntary basis’.⁸⁵ The CTC’s process of refining the provisions of 1373 is more sophisticated as it has had longer to respond to the Council’s requests that it ‘bear in mind all international best-practices, codes and standards’⁸⁶ and compile a directory of them.⁸⁷ In response, the CTC has produced a strikingly comprehensive and detailed Directory of International Best Practices, Codes and Standards,⁸⁸ and a Technical Guide to Implementation structured around the first three operative paragraphs of resolution 1373.⁸⁹ Notably, this Technical Guide forms the basis of the CTC’s detailed implementation surveys that monitor states’ implementation of their 1373 obligations.

The loose coordinating, curating and orchestrating roles of the CTC and 1540 Committee are commensurate with discipline’s nature as a form of capillary power. Discipline is most easily understood by honing in on one of the myriad capillaries through which it flows. The final section of this article traces disciplinary power into the work of the FATF, which plays a role in the implementation of both quasi-legislative resolutions. The case study reveals how the apparent jurisdictional autonomy afforded to states in these resolutions is effectively displaced by technical prescriptions. This is made possible by the paralleling of the logics of effectiveness and legitimacy. The disciplinary interventions on the underside of the law, which share the logic of effectiveness of the UNSC’s project of administrative decentralization, are obscured by the principle of subsidiarity at the level of the formal legal norm. For all its persistence at this formal level, subsidiarity has no traction in the non-formal realm of infra-law, and discipline effectively side-lines it.

IV Case Study: The Financial Action Task Force

The FATF is an inter-governmental body established by the G7 in 1989. Today, its membership has expanded to 34 states, the European Commission and the Gulf Cooperation Council. Its initial focus was anti-money laundering (AML) and in 1990 it produced 40 Recommendations to tackle it. In 2001 its remit was expanded to include countering the financing of terrorism (CFT) and it published an additional Nine Special Recommendations on Terrorist Financing. The ‘40+9

⁸³ UN Doc. S/Res/1673 (27 April 2006), op. 5(b)

⁸⁴ UN Doc. S/Res/1810 (25 April 2008), op. 11(d)

⁸⁵ UN Doc. S/Res/1977 (20 April 2011), op. 12

⁸⁶ UN Doc. S/Res/1456 (20 January 2003), op. para. 4(iii)

⁸⁷ UN Doc. S/Res/1566 (8 October 2004), op para. 7

⁸⁸ Available at <http://www.un.org/en/sc/ctc/bptable.html>

⁸⁹ Counter Terrorism Executive Directorate, *Technical Guide to the Implementation of Resolution 1373* (2009) at http://www.un.org/en/sc/ctc/docs/technical_guide_2009.pdf

Recommendations⁹⁰ are regularly updated and are supported by well-developed disciplinary mechanisms, practices, techniques and tactics. Despite the FATF's narrow membership, its Recommendations are intended to have universal effect. Rather than expand its own membership in order to achieve this, over 180 states belong to eight FATF-Style Regional Bodies (FSRBs)⁹¹ which monitor and assist states' implementation of the Recommendations. Remarkably, the FATF also holds states that are neither FATF nor FSRB members to its Recommendations. Its stated mission is to 'identify national-level vulnerabilities' and, to this end, to identify and engage 'with high-risk, non-co-operative jurisdictions and those with strategic deficiencies in their national regimes' which pose a threat to the financial system's integrity.⁹² The FATF shares the UNSC's totalizing logic of effectiveness that tolerates no weak-links, so it is perhaps no surprise that its technical Recommendations form part of the infra-law of 1373 and 1540. This has occurred through their incorporation as best practices by the Council's subsidiary bodies. They feature heavily in the CTC's Directory and *Technical Guide to the Implementation of Resolution 1373*.⁹³ The FATF has also been expressly endorsed by the UNSC, which encouraged the CTC to 'work closely with the FATF, including in the FATF's mutual evaluations process'.⁹⁴ Since 2007 it has also been active in the area of the financing of CBN proliferation and in 2013 it published guidance on the implementation of resolution 1540.⁹⁵ The FATF's work in this area has been noted by the UNSC⁹⁶ and the body has been invited brief the sub-committees on financing issues,⁹⁷ but none of the UNSC resolutions contain a decision that makes its Recommendations formally binding on all states.

The FATF works on the underside of 1540 and 1373 to ensure that all states have the capacity to play their part in protecting 'the integrity of the international financial system'.⁹⁸ Its practices are characteristically disciplinary, employing prescription, monitoring and correction to 'normalize' states. Apart from publishing and disseminating the Recommendations, it produces an abundance of technical guidance for their implementation. In order to see that they are implemented, it uses

⁹⁰ *The Financial Action Task Force Recommendations: International standards on combating money laundering and the financing of terrorism & proliferation* (Paris, February 2012) at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

⁹¹ These are: The Asia Pacific Group; the Caribbean FATF; MONEYVAL (under the auspices of the Council of Europe), the Eurasian Group; the Eastern and Southern Africa AML Group; the Inter-Governmental Action Group of West Africa; the Middle East and North Africa FATF; and the FATF of Latin America. There are currently plans for a ninth FSRB to cover Central Africa; GABAC.

⁹² Financial Action Task Force Mandate 2012-2020 (20 April 2012) at <http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf>, Article 3(d)

⁹³ Counter-Terrorism Executive Directorate, *supra* note 89

⁹⁴ UN Doc. S/Res/2129 (17 December 2013), op. 17

⁹⁵ FATF, *The Implementation of Financial Provisions of United Nations Security Council Resolutions to Counter the Proliferation of WMD* (June 2013), at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-UNSCRS-Prolif-WMD.pdf>

⁹⁶ UN Doc. S/Res/1977 (20 April 2011), preamble

⁹⁷ Joint open briefing of the Chairs of the Security Council Committees and the president of the FATF, 18 November 2013. A vodcast is available here: <http://webtv.un.org/meetings-events/watch/joint-open-briefing-of-the-chairs-of-the-security-council-committees-and-the-president-of-the-fatf/2851464364001#full-text>

⁹⁸ FATF Mandate, *supra* note 92, Article 1(2)

repeated mutual evaluation reviews (MERs) which subject states to constant supervision. Finally, it uses both carrot and stick to correct any deficiencies it finds by ranking states according to the progress they have made. The cumulative effect of these processes is to radically diminish national control over the implementation of their obligations, while constantly reasserting national responsibility to implement, which then acts as a motor for normalization.

A. Prescriptions

Foucault explained how disciplinary power focuses on the ‘control of activity’⁹⁹ through the ‘elaboration of the act’.¹⁰⁰ Discipline is not satisfied with the open-textured UNSC resolutions because national control over their interpretation is inimical to normalization according to an optimal model. The model serves ‘as a common standard, a basic principle of comparison’¹⁰¹ and is constructed from micro-prescriptions that leave little room for interpretation. The FATF shares this logic: It seeks to homogenize states’ AML and CFT measures and ‘closing down regulatory arbitrage is essentially what the FATF is all about’, so as to prevent actors from exploiting disparities in regulatory standards between jurisdictions by eliminating difference.¹⁰² This is achieved by breaking down the legal norms into micro-prescriptions through multiple tiers of increasingly detailed prescriptions.

The first tier of infra-law is formed by the Recommendations themselves which, since there are 49 of them, already significantly disambiguate the sub-paragraphs of the quasi-legislative resolutions to which they are relevant. The next tier is made up of technical guidance for implementing the Recommendations, which is itself broken down into several strata. The first stratum comprises ‘interpretive notes’ to each recommendation which form part of the FATF standards and are intended to be mandatory except where they use examples that are intended to give guidance only.¹⁰³ The second stratum comprises detailed Guidance and Best Practices papers published on specific recommendations, such as the guidance on transparency and beneficial ownership which corresponds to recommendations 24 and 25,¹⁰⁴ as well as on cross-cutting issues, such as the recent rise in prepaid cards, mobile payments and internet-based payment services.¹⁰⁵ The third stratum is constituted by Typology Reports in the form of research papers on highly specific issues such as the relevance of the diamond trade to AML and

⁹⁹ Foucault, *supra* note 46, at 149

¹⁰⁰ *Id.* at 151

¹⁰¹ François Ewald, *Norms, Discipline and the Law* 30 REPRESENTATIONS 138 (Spring, 1990), at 148

¹⁰² Roger Wilkins, *Objectives for the Australian Presidency of the FATF XXVI 2014-15* at <http://www.fatf-gafi.org/media/fatf/documents/Objectives%20for%20FATF%20XXVI%202014%202015.pdf>, at 2

¹⁰³ The FATF Recommendations *supra* note 90, at 8

¹⁰⁴ FATF, *Guidance on Transparency and Beneficial Ownership* (Paris, October 2014) at <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>

¹⁰⁵ FATF, *Guidance for a Risk-Based Approach to Prepaid Cards, Mobile Payments and Internet-Based Payment Services* (June 2013) Paris at <http://www.fatf-gafi.org/documents/guidance/rba-npps-2013.html>

CFT,¹⁰⁶ or of the trafficking of Afghan opiates.¹⁰⁷ None of these documents has binding force as formal law; they are published as technical assistance. Nevertheless, they produce a densely-textured optimal model for implementation which reduces national control of implementation.

States' loss of control over interpretation is compounded because most of them have little input into FATF's processes of norm-creation: Not only are many of the norms classed as technical rather than political, states' input is also limited because of the FATF's 'club-like' composition.¹⁰⁸ Less than one fifth of UN member states are members of the FATF, which has a reputation as a particularly exclusive body.¹⁰⁹ The criteria for FATF membership exclude most states because members must be 'strategically important' both quantitatively in terms of their GDP and financial sectors, and qualitatively in terms of their impact on the global financial system and their participation in FSRBs.¹¹⁰ The last state to meet these criteria was India in 2010. FATF decisions are rolled out to jurisdictions through eight FSRBs in which most, but not all, UN member states participate. Since the FATF's avowed goal is to protect the integrity of the financial system, there is no opting-out of the Recommendations, and the FATF applies them to states that are not members of FSRBs even though these states have had absolutely no opportunity to participate in the standard-setting processes.

Even states that are members of FSRBs lack control over the standard-setting process, when they are not also members of the FATF itself. Non-FATF jurisdictions can only participate in FATF decision-making processes if their FSRBs meet certain criteria. Even if they do, there is little scope for critical voices as FSRBs

'should endorse the FATF Recommendations and mutual evaluation related material as interpreted by the FATF, and support other related FATF material and policies, such as best practice papers, guidance, and policy papers'.¹¹¹

These commitments ensure that the FSRBs channel the various strata of FATF prescriptions down to the regional level with the minimum amount of divergence. Given the FATF's desire to eradicate regulatory arbitrage, the FSRBs are less about promoting regional pluralism than diminishing its effect on the implementation of the Recommendations. There is a clear pecking-

¹⁰⁶ FATF, *Money laundering and terrorist financing through trade in diamonds* (October 2013) at <http://www.fatf-gafi.org/topics/methodsandtrends/documents/ml-tf-through-trade-in-diamonds.html>

¹⁰⁷ FATF, *Financial flows linked to the production and trafficking of Afghan opiates* (June 2014) at <http://www.fatf-gafi.org/topics/methodsandtrends/documents/financial-flows-afghan-opiates.html>

¹⁰⁸ Peter Romaniuk, *Institutions as Swords and Shields: Multilateral Counter-Terrorism Since 9/11* 36 REV INTL STUDIES 591 (2010), at 602.

¹⁰⁹ Krisch, *supra* note 36, at 23

¹¹⁰ FATF, *Membership Policy* at <http://www.fatf-gafi.org/pages/aboutus/membersandobservers/fatfmembershippolicy.html>

¹¹¹ FATF, *High-Level Principles & Objectives for FATF and FATF-style regional bodies* (October 2012) at 4-5 at <http://www.fatf-gafi.org/media/fatf/documents/High-Level%20Principles%20and%20Objectives%20for%20FATF%20and%20FSRBs.pdf>

order between the FATF and its regional bodies, as reflected in the first principle of High Level Agreement that governs relations between them: ‘The FATF is the only standard-setting body and the guardian and arbiter of the application of its standard’.¹¹² The two-tier system of membership is difficult to square with the principles of global administrative law,¹¹³ particularly because, at least initially, ‘non-members were voiceless in the process of crafting the FATF Recommendations’.¹¹⁴ While the FATF made efforts to consult more widely when the Recommendations were revised in 2012, not qualitative changes were made and the revision was limited to expanding the existing approach to include new and emerging threats to the integrity of the financial system.¹¹⁵

Another factor that diminishes national control over implementation is the technical, rather than political, character of its norms. An integral part of the way the FATF normalizes states is ‘through the dissemination of knowledge-based technologies of Government’.¹¹⁶ National control is diminished both by the consequent depoliticization of the norms and by the yen to be up-to-date built in to technical knowledge. The FATF prides itself on keeping its recommendations up-to-date¹¹⁷ and its prescriptions are subject to continuous updating and improvement to keep pace with changes in technology, knowledge and in the practices of money launderers and terrorist financiers. In consequence, the process of normalization is open-ended because its logic of effectiveness demands that it take account of the latest technical developments. The FATF’s ‘typologies’ research continually tweaks the optimal model of interpretation in the light of research conducted by experts from FATF member states. This research also tends to expand the FATF’s sphere of competence by seeking out ‘new trends or methods in misuse of the financial system’.¹¹⁸ As the FATF’s remit grows, so national control of implementation diminishes. This effect is exacerbated because the FATF’s reliance on research produces a ‘depoliticised expert orthodoxy’.¹¹⁹ Typologies reports are not purely descriptive, and feed into the process of drafting prescriptive guidance. For instance, a recent report on the risk of

¹¹² *Id.* at 1

¹¹³ Jarred Wessel, *The Financial Action Task Force: A Study in Balancing Sovereignty and Equality in Global Administrative Law* 13 WIDENER LAW REVIEW 169 (2006); Navin Beekary, *The International Anti-Money Laundering and Combating the Financing of Terrorism Regulatory Strategy* 31 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 137 (2011) at 192

¹¹⁴ Kenneth S. Blazejewski, *The FATF and its Institutional Partners* 22 TEMPLE INTERNATIONAL AND COMPARATIVE LAW JOURNAL 1 (vol 1, 2008) at 44

¹¹⁵ The FATF Recommendations *supra* note 90, at 8-9

¹¹⁶ Yee-Kuang Heng and Ken Mcdonagh, *The other War on Terror revealed* 34 REVIEW OF INTERNATIONAL STUDIES 553 (2008) at 572

¹¹⁷ The FATF Recommendations *supra* note 90, 7-9

¹¹⁸ FATF, Annual Report 2013-14 (2014) Paris at <http://www.fatf-gafi.org/media/fatf/documents/brochuresannualreports/FATF%20Annual%20Report%202012%202013.pdf>, at 14

¹¹⁹ Valsamis Mitsilegas, *The European Union and the Global Governance of Crime* 153 in V. Mitsilegas, P. Alldridge and L. Cheliotis (eds), GLOBALISATION, CRIMINAL LAW AND CRIMINAL JUSTICE. THEORETICAL, COMPARATIVE AND TRANSNATIONAL PERSPECTIVES (2015)

terrorist abuse of non-profit organizations¹²⁰ will inform the revision of the guidance on combatting the abuse of NPOs as required by Recommendation Eight.¹²¹ The research-driven nature of changes to the FATF's prescriptions display a logic of effectiveness operating according to an underlying assumption that technical knowledge is objective and therefore universally applicable. Subsidiarity is side-lined by these prescriptions because such an approach to knowledge is blind to any legitimacy issues.

B. Mutual Evaluation Reports

The FATF's technical, multi-layer prescriptions are given normalizing effect by technologies of surveillance. Surveillance is perhaps the most recognizable element of disciplinary power, particularly in the form of Bentham's Panopticon which operated according to a principle of 'omni-visibility'.¹²² Less emblematic, but just as important a tool of surveillance, is the examination which '*transformed the economy of visibility into the exercise of power*'.¹²³ The examination measures conformity with the prescribed model in order to identify and remedy deficiency. The FATF makes extensive use of them in the form of Mutual Evaluation Reports (MERs). These reports monitor states' implementation of the Recommendations on a rolling basis in order to identify deficiencies that could jeopardize the integrity of the global financial system. MERs are intended to help states to improve their performance by highlighting shortcomings and priority areas of action. The evaluation process is iterative and subsequent evaluations assess the extent to which a state has made the improvements required as measured against the optimal model constituted by the FATF's technical micro-prescriptions.

All members of the FATF and its FSRBs are subject to MERs conducted according to a methodology that measures the effectiveness of implementation as well as basic technical compliance with the Recommendations.¹²⁴ The FATF takes evaluation very seriously and no state is immune from findings of non-compliance or ineffectiveness. This reflects the nature of the FATF's project as a universal effort solution to the problems of AML and CTF. For example, the USA's MER for the third round of FATF evaluations in 2006 revealed several shortcomings and ends in a lengthy action plan for improvement before the fourth round in 2016. Of the 49 categories, the US was assessed as 'compliant' – meaning that no further work was necessary – in only 15 of them. It was found to be 'non-compliant' – indicating major shortcomings - in four

¹²⁰ FATF Report, 'Risk of Terrorist Abuse in Non-Profit Organisations' (June 2014) at <http://www.fatf-gafi.org/media/fatf/documents/reports/Risk-of-terrorist-abuse-in-non-profit-organisations.pdf>

¹²¹ According to the FATF website at <http://www.fatf-gafi.org/topics/methodsandtrends/documents/risk-terrorist-abuse-non-profits.html>

¹²² Michel Foucault, *PSYCHIATRIC POWER: LECTURES AT THE COLLEGE DE FRANCE 1973-1974* (trans. Graham Burchell) (2008) at 48

¹²³ Foucault, *supra* note 46, at 187 *italics in original*

¹²⁴ FATF, *Methodology for assessing technical compliance with the FATF Recommendations and the Effectiveness of AML/CTF systems*, 22 February 2013 at <http://www.fatf-gafi.org/media/fatf/documents/methodology/FATF%20Methodology%202022%20Feb%202013.pdf>, pp. 11-14

of them, including in the beneficial ownership of property and the regulation of casinos and other non-financial institutions.¹²⁵ One of the findings of non-compliance related to Recommendations Five (on customer due diligence) and 10 (on record keeping) because so-called designated non-financial business and professions (DNFBPs) such as casinos, accountants, lawyers, dealers in precious metals and real estate agents are not subject to sufficient customer identification and record-keeping obligations. In its action plan, the US was advised that it should ‘explicitly require casinos to perform enhanced due diligence for higher risk categories of customers’ and ‘extend customer identification, record keeping and account monitoring obligations’ to all other DNFBPs.¹²⁶ Even the US’s national control over implementation is affected by the MERs.

The FATF attempts to convert the action plans into concrete improvements by including a follow-up process to ensure that states do not simply ignore them. National control is most extensively diminished where a state has failed to progress from the so-called ‘follow-up’ process designed to ensure the recommended improvements are made. In this formal follow-up process the assessed state reports to the FATF Plenary on the steps it has taken to address its deficiencies. A state can only be ‘removed from follow-up’ by submitting a formal application for a finding that it is at least ‘largely compliant’.¹²⁷ As Turkey’s experience illustrates, the process of removal is not a mere formality. Instead, states must demonstrate the detailed measures they have taken to rectify the deficiency. In October 2014 the FATF published its 15th follow-up report on Turkey’s 2007 MER.¹²⁸ The aim of the follow-up process is to raise Turkey’s level of compliance across the Recommendations to a status of ‘largely compliant’.

The episode illustrates the tremendous depth the FATF’s corrective process reaches. A sticking point in its action plan had been Turkey’s criminalization of terrorist financing as required by resolution 1373 and the FATF special recommendation II (2001).¹²⁹ Turkey had adopted a terrorist financing law in order to implement its obligations, but the FATF found it to be ineffective and deficient in a number of respects, including in the detailed definition of the *actus reus* and *mens rea* of the offence and of the sanctions available on conviction. The MER found that Turkey’s definition of terrorist funding was too narrow as it only dealt with financial support and was concerned that the mental element for the offence, ‘knowing and willing’, was too high a threshold. Before it would sign-off on compliance, the FATF required assurances about how

¹²⁵ FATF, *Third Mutual Evaluation Report on AML and CFT: United States of America* (2006) at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf>

¹²⁶ *Id.*

¹²⁷ FATF, Annual Report *supra* note 118, at 11

¹²⁸ FATF, 15th Follow-up report on the mutual evaluation of Turkey (October 2014) at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/Turkey-FUR-2014.pdf>

¹²⁹ Turkey’s mutual evaluation pre-dates the revision of the FATF Recommendations in 2012 and is therefore measured against the old 2001 edition of the special recommendations which are available at <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>

elements of the offence would be interpreted by Turkish courts.¹³⁰ This is an astonishing interference with Turkey's control over the process of implementation and shows that the FATF is not satisfied with paper compliance. This makes sense if Turkey is seen as part of a decentralized apparatus for regulating the global financial system; its criminal justice system must be fit for purpose *in practice*. Moreover, what counts as fit for purpose is determined by the FATF and not the evaluated state.

C. Ranking

The examination makes it possible to rank individuals and 'discipline is an art of rank, a technique for the transformation of arrangements'.¹³¹ The FATF ranks states using shades of compliance; not complaint, partially compliant, largely compliant and compliant. In disciplinary systems, ranking is transformative and is used to correct deficiency 'through the mechanics of a training'.¹³² Ranking brings with it 'a whole micro-economy of privileges and impositions',¹³³ which can be seen in the listing practices of the FATF to which we now turn. Ranking supplies the FATF's carrots and sticks and confounds the notion that discipline is a wholly 'soft power'. Although discipline does not enforce its norms in the way that the sovereign enforces the formal law, 'the disciplines established a small 'infra-penalty'' to bring the deficient into line.¹³⁴ Disciplinary coercions, like disciplinary norms, inhabit the obscured underside of law. As we shall see, however, they are also the points at which discipline becomes most visible and, therefore, most vulnerable to critique as in the case of the FATF's practice of 'blacklisting' non-compliant states.

The FATF names and shames non-compliant and non-cooperative jurisdictions,¹³⁵ with a view to mending rents in the fabric of the global financial system. The practice, like all disciplinary punishment, is 'essentially corrective'.¹³⁶ States failing to show sufficient progress in their implementation of the Recommendations are referred to the International Co-operation Review Group (ICRG) as 'high risk and non-cooperative' jurisdictions. The ICRG process moves from the soft corrective training of technical assistance to the hard corrective training of ranking. It is notable that 'non-cooperative' is a wider category than total failure to engage; it can also apply to states which do take the MER follow-up process sufficiently seriously.¹³⁷ The class of 'high risk and non-cooperative', like the other 'shameful' classes with which Foucault was concerned, 'existed only to disappear'.¹³⁸ It is a permanent classification of a jurisdiction as second-class, it

¹³⁰ FATF Report, *supra* note 128, at 15-17

¹³¹ Foucault, *supra* note 46, at 146

¹³² *Id.* at 180

¹³³ *Id.* at 180

¹³⁴ *Id.* at 178

¹³⁵ Guy Stessens, *The FATF "Black List" of Non-Cooperative Countries* 14 LEIDEN J INTL L 199 (vol 1, 2001)

¹³⁶ Foucault, *supra* note 46, at 179

¹³⁷ FATF Annual Report, *supra* note 118, at 22

¹³⁸ Foucault, *supra* note 46, at 182

is a spur to improvement. The FATF explained that ‘public identification of countries with serious weaknesses in their AML/CFT measures has proven to be a powerful tool for improving global compliance’ because ‘it puts pressure on the countries in question to act on and address these deficiencies in order to maintain their position in the global economy’.¹³⁹

The infra-penalty of listing works in several different ways. Firstly, there is a loss of position and prestige when a state is ‘named and shamed’ in the ICRG’s bi-annual public statements. At the time of writing, the public list contained the names of 24 states, together with brief descriptions of their deficiencies.¹⁴⁰ Secondly, the list generates incentives to improve because it contains several sub-categories reflecting different shades of non-cooperation. At one end are jurisdictions subject to a FATF call for counter-measures, and at the other end are jurisdictions no longer subject to monitoring. It is equally important for the FATF’s purposes to advertise states’ successes as well as their failures. The publication of the lists therefore include something of a public ceremony of graduation which records states’ progress through the shades of non-cooperation and ‘improving compliance’ and, eventually, off the list altogether. Of course, states can regress as well as improve and Uganda has recently found itself threatened with being demoted from the ‘improver’ category. The ICRG process is an excellent example of ‘this play of quantification, this circulation of plus and minus points, [by which] the disciplinary apparatuses hierarchized the ‘good’ and ‘bad’ subjects in relation to one another’.¹⁴¹

A third aspect of the infra-penalty of listing is the FATF’s practice of calling for counter-measures as a tangible sanction for non-cooperation. At the time of writing only Iran and North Korea are subject to these. States in the sub-category directly above this nadir are also labelled with a warning that other states should ‘consider the risks’ arising from their deficiencies. At present, the three states on this list – Algeria, Ecuador and Myanmar – are all members of FSRBs and have not attempted to opt-out of the system entirely as have Iran and North Korea. All the states on the non-cooperative list are affected in a material way because non-cooperative equates to a status of ‘high risk’ and potential trading partners are warned that ‘could find that they are no longer able to do business with [the listed states] at all’.¹⁴² For higher risk jurisdictions, FATF Recommendation 19 requires financial institutions ‘to apply enhanced due diligence measures’ to entities from ‘higher risk jurisdictions’. According to the interpretive note on this article, these measures might involve more stringent reporting requirements, prohibiting the establishment of subsidiaries or branches in the country concerned and in general raising the cost of doing business so as to dissuade institutions and businesses from making transactions in the higher risk jurisdiction.¹⁴³

¹³⁹ FATF Annual Report, *supra* note 118, at 22

¹⁴⁰ FATF, Public Statement: High Risk and Non-Cooperative Jurisdictions, 27 February 2015

¹⁴¹ Foucault, *supra* note 46, at 181

¹⁴² FATF, Annual Report *supra* note 118, at 22

¹⁴³ The FATF Recommendations *supra* note 90, at 79

In sum, the FATF converts its technical prescriptions into measurable behaviour changes using mechanisms of surveillance and correction in a way that is characteristic of disciplinary systems. In the FATF system, states are deprived of national control over the implementation of their obligations while the system, at the same time, emphasizes their responsibility for implementation. The FATF's Recommendations, like the UNSC's quasi-legislation to which it has become attached as infra-law, are the product of a logic of effectiveness that seek to transform states into effective nodes of decentralized administration of the global financial system. The principle of subsidiarity remains present in the open-textured drafting of the quasi-legislative provisions and the lack of enforcement mechanisms, but it has no place on the underside of law and is effectively side-lined by disciplinary tactics of implementation.

V Conclusion

In global governance the principle of subsidiarity has a logic of legitimacy; responsibility is allocated to the national level in order to bring decision-making closer to the human beings it affects. Sometimes, as in cases of weakest-link goods like the prevention of transnational security challenges, a logic of effectiveness drives the allocation of responsibility to the national level. We saw how the UNSC concocted a universal effort solution of decentralized administration which strives, however unlikely in the achievement, to completely regulate specific aspects of the inter-national space in order to prevent terrorists from operating. Pursuing this project led the Council to lay down a skeletal framework for a common approach to the regulation of terrorist financing and the proliferation of CBN material and its means of delivery. Concerns about the legitimacy of this 'quasi-legislation' given the UNSC's democracy deficit meant that it has had to find ways of ensuring that states implement their obligations without counter-productively alienating or angering them. The logic of effectiveness underlying the Council's project is echoed by the logic of effectiveness underpinning disciplinary power. Along with discipline's under-the-radar modus operandi, the shared logic has rendered discipline an ideal instrument of implementation. The problem is that discipline operates on the underside of law and seeks to immunize itself from critical scrutiny and challenge. The retention of the principle of subsidiarity on the surface of the quasi-legislation only tends to entrench this situation. In effect, discipline seeks to ensure national responsibility without national-control, effectively side-lining the principle of subsidiarity.